Filed 12/14/16 P. v. Lee CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB WILLARD LEE,

Defendant and Appellant.

F069985

(Super. Ct. No. SF015290B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Paul A. Bernardino, Deputy Attorneys General, for Defendant and Respondent.

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INTRODUCTION

This matter involves three defendants, appellant Jacob Willard Lee, Ryan Heath Cupelli, and Gilbert Luke Newsom[1] (collectively the Codefendants). A jury convicted appellant of voluntary manslaughter (Pen. Code, § 192, subd. (a);[2] count 1) for the death of Jerry Crook, an inmate at Wasco State Prison. Appellant received an aggregated 12-year prison sentence.[3] In companion appeal F071004, we resolve issues raised by Cupelli and Newsom, who were both convicted of second degree murder (§ 187, subd. (a)) for Crook's death.

Appellant claims the evidence is insufficient to support his conviction. We affirm.

FACTUAL BACKGROUND

The Codefendants did not present any evidence at trial. Below is a relevant summary of the prosecution's case.

On July 31, 2009, Jerry Crook, a new inmate at Wasco State Prison, was attacked by the Codefendants and severely beaten. Crook appeared weak and frail just prior to the attack. He had been coughing continuously during a new inmate briefing earlier that day, and he seemed ill. After the attack, Crook slipped into a coma and remained in a vegetative state for a little over two months. The pathologist who performed the autopsy opined that the cause of death stemmed from complications following blunt force trauma to the head. Crook weighed 95 pounds at the time of his autopsy.

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1 The spelling of "Newsome" was used in both the clerk's and reporter's transcripts in the lower court. Via letter dated October 6, 2015, Newsom's appellate counsel advised this court that his client's name was misspelled in the Kern County Superior Court records.

2 All future statutory references are to the Penal Code unless otherwise noted.

3 Appellant was also sentenced on a trailing case, SF016286A, which is not part of this present appeal.

Two witnesses, both inmates, testified at trial about the details of the attack. Their testimony conflicted regarding whether Cupelli or Newsom delivered the blunt force trauma to Crook's head.

A. Testimony from Fredrick Marmelstein.

Fredrick Marmelstein was serving time at Wasco for burglary and a probation violation. He had convictions for identity theft in 2006, misdemeanor burglary and petty theft in 1999, and possession of bad checks in 1998. He told the jury he had remained out of trouble since his parole in 2009.

The Codefendants were inmates at Wasco when Crook was attacked. Marmelstein knew appellant as "Youngster," Cupelli as "Bam" or "Bam Bam," and Newsom as "Silver." Marmelstein's bunk was on the second tier of the housing unit. On the day of the attack, he observed the Codefendants sitting together at a table on the ground floor. They were drinking prison-made alcohol and they appeared very drunk. He observed Crook, a newly arriving inmate at Wasco, walking up some stairs to the second tier of cells. The Codefendants grouped together and ran up to the second tier. Appellant pushed Crook down to the floor near Marmelstein's cell. Marmelstein jumped over Crook to get out of the way.

About 10 feet away, Marmelstein turned around and observed the attack. He saw Cupelli and Newsom hitting and kicking Crook. Appellant did not participate further in the attack. Crook rolled into a ball and tried to get between bunk beds. He kept asking what had he done, saying he did not know his attackers.

According to Marmelstein, Cupelli used the bunk beds to lift himself up before slamming both feet down onto Crook's head. Marmelstein heard Crook's head hit the concrete floor, and he stopped calling out. Cupelli jumped on Crook's head and body over five more times, and Crook stopped moving. In the meantime, Newsom was kicking and hitting Crook, including his head. Marmelstein heard Cupelli say, "[L]et's get out of here." Newsom kicked Crook a few more times, including his head. Cupelli

"bear hugged" Newsom, lifting him away from Crook. Cupelli ran to his bunk area on the second tier. Cupelli took off his shirt and threw it on the floor before getting into his bunk bed. Newsom went to a common toilet and Marmelstein saw Newsom wiping blood off of himself. Marmelstein estimated the attack lasted about two minutes.

Correctional officers responded and the facility was placed on lockdown. Inmates were taken out into the yard. In the yard, Marmelstein heard Cupelli say, "[W]e kicked his ass."[4] After the attack, Marmelstein's mattress and belongings had blood on them. Appellant later came to him, apologized, and gave him some shower shoes and a mattress.

B. Testimony from Daniel VanBenthuysen.

Daniel VanBenthuysen was serving time at Wasco for a parole violation for using drugs. He had convictions for a 1999 second degree burglary and a 2004 forgery.

Before the attack, he observed the Codefendants sitting together playing cards. They had been drinking and they appeared drunk. VanBenthuysen saw a group of new arrivals going up the stairs with bags on their backs. He saw the Codefendants attack Crook on the second tier. VanBenthuysen was about eight to 10 bunks away from the attack. He described Crook as a "shorter, older gentleman." He heard Crook say, "I don't even know you guys." According to VanBenthuysen, Cupelli and appellant stopped the attack after about 10 seconds but Newsom continued to strike Crook. Newsom "[k]ept kicking him and stomping him and just, yeah, beating him. And it went on for like a really long time." Cupelli returned and pulled Newsom off of Crook. At that time, Crook was between two bunk beds, and Newsom was "stomping" Crook's head. Afterwards, Newsom went to the bathroom.

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[4] The trial court instructed the jury to consider this statement only as to Cupelli, and not to either Newsom or appellant.

During his initial statements to correctional officers, VanBenthuysen did not mention Cupelli's or appellant's involvement in the attack. He did not believe Cupelli or appellant were seriously involved and they were not responsible for what happened. He believed the attack lasted about two minutes.

C. Testimony from correctional officers.

Aunter Haddad was working as a correctional officer at Wasco on the day of this incident. He heard a disturbance and looked outside his office. He observed several inmates looking in one direction. The building, which was normally quite loud, became silent. Haddad saw Cupelli rushing back to his cell. Cupelli took off his shirt and threw it on the ground. Cupelli's hands "appeared to be very shaky." As he ran to the scene of the incident, Haddad saw Newsom in a restroom in a crouched position.

Correctional officers secured the facility and medical personnel attended to Crook, who was lying unresponsive face down in a large pool of blood. Blood had spattered onto the ceiling above him. All of the inmates in the facility were stripped and searched. No inmates were found with injuries or weapons.

Roger Cook worked at Wasco in the investigative services unit. He observed some inmates in holding cells following the attack. He heard Newsom say, "I'm responsible. I'm responsible." Cook then interviewed Newsom, which was recorded and played for the jury. When Newsom was informed he was being charged with attempted murder, he said, "Right on." Cook noted at trial that Newsom had appeared intoxicated, with slurred speech, red, watery eyes, and an unsteady gait. Newsom, however, seemed to understand Cook's questions and he answered everything correctly.

D. Forensic evidence.

DNA blood swabs were collected from Newsom's left ring finger, left knee, left foot, and his cell blanket. Blood swabs were collected from Cupelli's clothes. The DNA obtained from Newsom's left knee was a single source profile that matched Crook's DNA. The DNA obtained from Newsom's left ring finger, cell blanket and left foot was

a mixture from two people: Newsom was a major contributor and Crook's DNA could not be excluded as a minor contributor. Cupelli and appellant were excluded. The DNA obtained from Cupelli's clothes was also a mixture from two people: Crook's DNA could be a possible contributor to a major portion of this mixture and Cupelli could not be excluded as a minor contributor.

DISCUSSION

I. Sufficient Evidence Supports Appellant's Conviction.

Appellant asserts the evidence was insufficient in general to support his conviction for voluntary manslaughter as an aider and abettor, and specifically under the natural and probable consequences theory of culpability. He contends reversal is required.

A. Background.

1. Relevant jury instructions.

With CALJIC No. 3.00, the jury was instructed on aiding and abetting. The term "principals" was defined as those persons who commit a crime, including those who aid and abet. "When the crime charged is murder, the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state. If the aider and abettor's mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's if the aider and abettor has a less culpable mental state."

The jury was instructed, in part, that a person aids and abets a crime if he (1) had knowledge of the perpetrator's unlawful purpose, (2) had the intent or purpose of committing, encouraging or facilitating commission of the crime, and (3) acted to aid, promote, encourage, or instigate the crime's commission.

With CALJIC No. 3.02, the jury was instructed that one who aids and abets is not only guilty of that crime, but also guilty of any other crime committed by a principal which is a natural and probable consequence of the original crime. To find a defendant

guilty of murder under this theory, it must be beyond a reasonable doubt that (1) battery was committed; (2) the defendant aided and abetted in battery; (3) a co-principal in that crime committed murder; and (4) the murder was a natural and probable consequence of the battery. An objective test is used to determine whether a consequence is natural and probable, which is based on what a person of reasonable and ordinary prudence would have expected was likely to occur. All of the circumstances surrounding the incident should be examined.

A "natural consequence" is "within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. [¶] 'Probable' means likely to happen."

2. The prosecutor's relevant closing arguments.

The prosecutor argued Crook's death was the natural and probable consequence of the battery. Three young, healthy men attacked an older, frail man. Crook was knocked to the ground and punched repeatedly. His head was stomped on. This showed implied malice for all of the Codefendants to be guilty of second degree murder. Later, the prosecutor referenced the jury instructions on aiding and abetting. He contended each of the Codefendants was guilty of first degree murder for the attack on Crook. He later mentioned briefly that all of the Codefendants could be guilty of second degree murder for aiding and abetting.

During the prosecutor's rebuttal, he contended both VanBenthuysen and Marmelstein had a similar number of past crimes of moral turpitude, making them equal as witnesses in that regard. The prosecutor conceded he was unable to prove whether a kick or a stomp to Crook's head was the cause of death. It was also impossible to know whether it was the first or second kick, or the first or second stomp. He called the jury's attention to the instruction regarding aiding and abetting, and portions of that instruction were read to the jury. He later argued VanBenthuysen had a clear view of the initial assault and said all three Codefendants attacked Crook, punching him. Marmelstein was

the closest witness and he saw Cupelli "stomping" on Crook's head. He contended Cupelli and Newsom were "co-principals" in first degree murder, and appellant aided and abetted the crime.

B. Standard of review.

For an appeal challenging the sufficiency of evidence, we review the entire record in the light most favorable to the judgment to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt based on "'evidence that is reasonable, credible, and of solid value ….'" (*People v. Jones* (2013) 57 Cal.4th 899, 960.) In doing this review, we are not required to ask whether we believe the trial evidence established guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Rather, the issue is whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence favorably for the prosecution. (*Ibid*.) We are to presume the existence of any fact the jury could have reasonably deduced from the evidence in support of the judgment. (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

It is a question of fact whether a defendant aided and abetted a crime. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) All reasonable inferences and conflicts in the evidence must be resolved in favor of the judgment on appeal. (*Ibid.*)

C. Analysis.

Appellant contends he had only a minimal role in this attack, and he never participated in the severe beating. He argues there is "absolutely no evidence" he acted with knowledge of Cupelli's and/or Newsom's criminal purposes, or with an intent to encourage or facilitate this crime. We disagree.

1. Sufficient evidence establishes aiding and abetting.

In California, a person who aids and abets the commission of a crime is a "principal" in the crime. (§ 31.) One who aids and abets the commission of a crime shares the guilt of the actual perpetrator. (*People v. Prettyman* (1996) 14 Cal.4th 248,

259.) "'[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime.' [Citations.]" (*People v. Johnson* (2016) 62 Cal.4th 600, 630.) "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.]" (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 429.)

Here, before the attack, the Codefendants were seen sitting together. As Crook walked up a flight of stairs, the Codefendants gathered and went to the second tier. Appellant came at Crook and pushed him to the cement floor. Cupelli and Newsom immediately attacked Crook. After the attack, Marmelstein's mattress and belongings had blood on them. Appellant later came to him, apologized, and gave him some shower shoes and a mattress.

We are to presume the existence of any fact the jury could have reasonably deduced from the evidence in support of the judgment. It can be inferred from appellant's actions that he knew of the plan to beat Crook, and he pushed Crook down with the intent to facilitate the battery. Appellant's concerted action with Cupelli and Newsom reasonably implies a common purpose and intent.

2. Sufficient evidence supports the "natural and probable consequences" theory.

Appellant contends no evidence established his knowledge that Cupelli and/or Newsom were capable of killing Crook in this manner. He asserts the prosecutor's closing argument was "imprecise and obfuscating" because appellant's limited action was not differentiated from Cupelli's and Newsom's more egregious actions. He argues Crook's death was not a foreseeable, natural and probable consequence of his mere push. We disagree.

An aider and abettor is criminally liable for "the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages. [Citation.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Under the "natural and probable consequences" doctrine as applied to aiders and abettors, an aider and abettor need not have intended to encourage or facilitate the particular offense which the perpetrator ultimately committed. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.) "'His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which … must be found by the jury.' [Citation.]" (*Ibid.*)

The "natural and probable consequences" doctrine is triggered in an aiding and abetting case when a codefendant commits an offense other than the target crime, and the offense is a natural and probable consequence of the target crime that the defendant aided and abetted. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 262.)

"A nontarget offense is a '"natural and probable consequence"' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability '"is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."' [Citation.] Reasonable foreseeability 'is a factual issue to be resolved by the jury.' [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 161–162.) "Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature. [Citations.]" (*Id.* at p. 164.) "'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is

imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' [Citation.]" (*Ibid.*)

Here, different witnesses described Crook as an "older gentlemen" and ill. He weighed 95 pounds at the time of his autopsy. The evidence strongly suggests Crook was extremely weak and frail when this crime occurred. His attackers, however, were relatively young and weighed considerably more. Photographs of the Codefendants were admitted into evidence, which generally depicted their respective appearances on the day of this crime. Based on the probation reports, Lee was born in 1988, is five feet 11 inches tall and weighed approximately 195 pounds. Cupelli was born in 1984, is five feet nine inches tall and weighed approximately 180 pounds. Newsom was born in 1980, is five feet seven inches tall and weighed approximately 200 pounds.

With CALJIC No. 3.00, the jury was instructed that an aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state. The jury was told that an aider and abettor's guilt may be more or less than the perpetrator's depending on the aider and abettor's mental state.

Appellant pushed Crook onto a cement floor. Cupelli and Newsom, who were stronger and heavier than Crook, immediately began to beat him. The target crime of battery rendered Crook unconscious, put him into a vegetative state, and he died. Under these circumstances, a rational jury could have concluded that Crook's death was a natural and probable consequence of the battery which appellant aided and abetted.

The evidence against appellant was reasonable, credible and of solid value. Based on a review of the entire record in the light most favorable to the judgment, a rational jury could have found appellant guilty beyond a reasonable doubt of the essential elements. Accordingly, substantial evidence supports this conviction and appellant's claim fails.

DISPOSITION

The judgment is affirmed.

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LEVY, Acting P.J.

WE CONCUR:

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GOMES, J.

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KANE, J.